Filed 3/8/10 P. v. Livingston CA1/4

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE, Plaintiff and Respondent, v. ROBERT DYWANE LIVINGSTON, Defendant and Appellant.	A125120 (Solano County Super. Ct. No. FCR252957)

After appellant Robert Dywane Livingston lost his motion to suppress evidence, he was convicted of possession of methamphetamine and delaying a police officer. (Health & Saf. Code, § 11377, subd. (a); Pen. Code,[1] § 148 subd. (a)(1).) Sentenced to two years in state prison, he appeals. He challenges the denial of his suppression motion, the instructions given to the jury, and the sufficiency of evidence supporting his conviction of delaying a police officer. We affirm the judgment.

I. FACTS

In February 2008, Fairfield Police Officers Frank Piro and Kevin Carella went to a house on Michigan Street in Fairfield to conduct a child welfare check. Both officers, in full uniform, arrived in separate marked police cars. Appellant Robert Dywane Livingston and several other people were sitting outside a known drug house when the officers parked across the street. Carella recognized Livingston as a parolee. When Livingston saw the officers arrive, he appeared startled. As Piro and Carella approached

[1] All further statutory references are to the Penal Code unless otherwise noted.

the house, Livingston "popped up" and walked "a little faster" than normal into the house. Both officers ordered Livingston to stop. He did not do so. Piro and Carella pursued him until they reached the open front door. From the doorway, Piro saw Livingston enter a kitchen. There, with his back to Piro, Livingston made an underhanded tossing motion. Piro did not see anything leave Livingston's hand as he threw. As Livingston completed the throw, he turned around, walked toward Piro, and asked "What?" Within 15 to 20 seconds after entering the house, Livingston walked back out of the house, where the officers handcuffed him. In all, one to two minutes elapsed between the time the officers arrived and the time they took Livingston into custody.

After Carella handcuffed Livingston, Livingston told Carella he was on parole. Carella confirmed Livingston's parole status with the police dispatcher. Livingston had been released from prison approximately 10 days earlier.

Meanwhile, at Piro's instruction, Carella entered the kitchen and walked to the place where Livingston directed his throw. There, the officer found a bag of crystal methamphetamine on the floor. The kitchen was empty and clean at the time Carella discovered the baggie. A few minutes after Carella found the narcotics, on the living room couch a baby began to cry. Carella later testified that he was delayed in attending to the baby and performing the welfare check because both he and Piro were occupied with an uncooperative Livingston. After searching the residence, the officers also found two adults in a locked bedroom. Eventually, the officers contacted a responsible person to take custody of the baby.

In March 2008, Livingston was charged with possession of methamphetamine, destruction of evidence, and delaying a police officer. (Health & Saf. Code, § 11377, subd. (a); §§ 135, 148, subd. (a)(1).) His motion to suppress evidence found at the residence was denied before trial. (§ 1538.5.) During trial, the prosecution dismissed the destruction of evidence charge. In April 2009, a jury convicted Livingston of felony possession of methamphetamine, and misdemeanor delaying a police officer. **(**Health & Saf. Code, § 11377, subd. (a); § 148, subd. (a)(1).) In June 2009, Livingston was

sentenced to a total term of two years in state prison: a two-year term for felony possession and a concurrent 30-day jail term for the misdemeanor.

II. SUPPRESSION OF EVIDENCE

On appeal, Livingston contends that the officers' search of his home violated the Fourth Amendment and thus, that the trial court erroneously denied his motion to suppress the evidence obtained from that search. When ruling on a suppression motion, the trial court sits as a trier of fact with the power to judge credibility, resolve conflicts, weigh evidence and draw inferences. (*People v. Laiwa* (1983) 34 Cal.3d 711, 718.) On review of this ruling on appeal, we draw all presumptions in favor of the trial court's factual determinations. (*Ibid*.) As an appellate court, we must uphold the trial court's express or implied findings of fact if they are supported by substantial evidence. (*In re Arturo D.* (2002) 27 Cal.4th 60, 77.) We independently determine whether—on the basis of these facts—the challenged seizure met the constitutional standard of reasonableness. (*People v. Ramos* (2004) 34 Cal.4th 494, 506; *People v. Leyba* (1981) 29 Cal.3d 591, 596-597; *People v. Downing* (1995) 33 Cal.App.4th 1641, 1650.)

Both the federal and state Constitutions forbid an unreasonable search in a place of expected privacy. (U.S. Const., 4th Amend.; Cal. Const., art. I, § 13.) To determine whether a search was reasonable, we examine the totality of the circumstances as they were known to the officer at the time the search was carried out. (*People v. Sanders* (2003) 31 Cal.4th 318, 332-333.) If an officer has "reason to believe" that a suspect is subject to a search condition of parole, the officer may search areas of the residence over which the parolee exercises complete or joint control.[2] (*People v. Woods* (1999) 21 Cal.4th 668, 682.) We apply the "reason to believe" standard based on an objective determination of whether a person of reasonable caution and belief would believe the

[2] Livingston urges us to adopt the Ninth Circuit's interpretation equating "reason to believe" with a probable cause standard. (*Motley v. Parks* (9th Cir. 2005) 432 F.3d 1072, 1080.) We decline to do so. Instead, like the majority of state courts and federal circuits, we interpret "reason to believe" as demanding less than probable cause. (*People v. Bradford* (1997) 15 Cal.4th 1229, 1292; see, e.g., *Com. v. Silva* (Mass. 2004) 802 N.E.2d 535, 540.)

subject to be a parolee. (*Terry v. Ohio* (1968) 392 U.S. 1, 21-22.) A parolee's expectation of privacy is diminished by this status. (*People v. Sanders*, *supra*, 31 Cal.4th at p. 332.)

Here, the trial court accepted Carella's testimony that he knew of Livingston's parole status before he conducted the search. During the motion to suppress hearing, Carella testified that he knew Livingston was on parole either through personal contact or from a parole flyer. While Livingston contends this evidence was weak, the trial court's rejection of his suppression motion implies that the trial court found the officer's testimony to be credible. On appeal, we have no power to redetermine any credibility issues. (*In re Arturo D., supra,* 27 Cal.4th at p. 77.) Substantial evidence supports this factual finding.

Livingston also contends that the officers had no reason to believe he lived at the Michigan Street home. However, the record supports a contrary conclusion. The officers observed Livingston treat the house as his own, entering without knocking or asking permission. Indeed, it took him only 15 to 20 seconds to walk into the house, find the kitchen, quickly dispose of an unknown article, and return outside. Under these circumstances, an officer could reasonably believe that Livingston resided at the house. Thus, we find the officers' search of that house was lawful and conclude that the trial court properly denied Livingston's suppression motion.

III. JURY INSTRUCTIONS

A. *Flight*

Livingston asserts that the trial court should not have given a flight instruction because it was argumentative and unsupported by sufficient evidence. (See CALCRIM No. 372.)[3] We subject claims of instructional error, pure questions of law, to our

[3] CALCRIM No. 372, the instruction on "Defendant's Flight," states: "If the defendant fled [or tried to flee] (immediately after the crime was committed/ [or] after (he/she) was accused of committing the crime), that conduct may show that (he/she) was aware of (his/her) guilt. If you conclude that the defendant fled [or tried to flee], it is up to you to decide the meaning and importance of that conduct. However, evidence that the defendant fled [or tried to flee] cannot prove guilt by itself."

independent review. (*People v. Williams* (1988) 45 Cal.3d 1268, 1321.) A flight instruction is required if the prosecution relies on a defendant's flight as evidence tending to show guilt. (*People v. Lucas* (1995) 12 Cal.4th 415, 471; see § 1127c.) If the jury could reasonably infer that a defendant's flight reflected a consciousness of guilt, then a flight instruction is proper. (*People v. Abilez* (2007) 41 Cal.4th 472, 522-523.) The prosecution need only prove that a jury *could* find the defendant fled and *could* infer a consciousness of guilt from that evidence. (*People v. Bonilla* (2007) 41 Cal.4th 313, 328.)

Livingston contends that the flight instruction is argumentative because it invites a jury to make an inference favorable to the prosecution. (See *People v. Wright* (1988) 45 Cal.3d 1126, 1135.) However, appellate courts have found the standard instruction to be an unbiased statement of law that does not unduly favor the prosecution. (See, e.g., *People v. Paysinger* (2009) 174 Cal.App.4th 26, 31.) As the instruction did not presuppose the occurrence of the alleged crime, a reasonable jury would not misunderstand the instruction in a manner that might undermine the presumption of innocence. (*Ibid*.) We agree that the instruction given was a neutral statement of the law.

Livingston also challenges the sufficiency of evidence of flight to warrant giving this instruction. To justify a flight instruction, the law does not require the physical act of running, only a purpose to avoid being detained. (*People v. Abilez*, *supra*, 41 Cal.4th at pp. 522-523.) Here, the instruction given was appropriate. Livingston walked quickly away as the officers approached. He ignored repeated commands to stop and did not emerge from the house until after he discarded something. Taken together, Livingston's startled appearance when he first saw the police, his quick and deliberate retreat into the house, his disposal of contraband, and the fact that he was subject to a parole search condition, would allow a jury to infer flight. (*People v. Sanders*, *supra*, 31 Cal.4th at p. 332.) Thus, the trial court properly instructed the jury on flight as evidence tending to show a consciousness of guilt.

B. *Delay*

Livingston also argues that the trial court erroneously denied his request for a special instruction defining the word "delay" for the purposes of delaying an officer. By law, every person who willfully resists, delays, or obstructs any public officer in the discharge of his or her duties is guilty of a misdemeanor. (See §§ 17, subd. (a), 148, subd. (a)(1).) The trial court refused Livingston's request to define "delay" as disrupting the performance of an officer's duty for a *significant* amount of time. The trial judge noted that both sides could debate whether his conduct constituted delay but that no additional instruction was required for the jury to apply the legal standard.

A trial court has a duty to define technical terms—that is, words that have a legal meaning that differs from their nonlegal meaning. (*People v. Griffin* (2004) 33 Cal.4th 1015, 1022-1023.) The court has no duty to clarify commonly understood words. (*Id.* at p. 1022.) In this matter, the term "delay" was used in its common meaning. As no extra instruction was required, the trial court properly refused Livingston's requested instruction.

IV. SUFFICIENCY OF EVIDENCE

Finally, Livingston asserts that there was insufficient evidence to support his conviction for delaying a police officer. To sustain a conviction on appeal, there must be substantial evidence from which a rational trier of fact could find the defendant guilty beyond a reasonable doubt. (*People v. Johnson* (1980) 26 Cal.3d 557, 576-577.) When applying this standard of review, we cannot substitute our own assessment of a witness's credibility for that of the trier of fact. (*People v. Barnes* (1986) 42 Cal.3d 284, 303-304.) However, the question of whether Livingston's conduct legally constitutes delay is a question of law for us to determine on appeal. (See *People v. Leyba*, *supra*, 29 Cal.3d at pp. 596-597; *People v. Downing*, *supra*, 33 Cal.App.4th at p. 1650.)

The offense of delaying a police officer requires: (1) the defendant's willful delay of an officer, (2) as the officer was performing his or her duties, while (3) the defendant knew or had reason to know that the officer was engaged in the performance of these duties. (*In re Muhammed C.* (2002) 95 Cal.App.4th 1325, 1329.) Running away from an

officer can constitute delay within the context of this provision. (*Ibid.*) Even passive delay, such as the refusal to cooperate, may constitute delay. (*People v. Curtis* (1969) 70 Cal.2d 347, 356, fn. 6.)

Here, Livingston's actions could legally constitute delay within the meaning of the statute. He refused to cooperate and ignored the officers' order to stop. His conduct delayed the officers in performing the welfare check. While the one- to two-minute delay was brief, the statute does not require delay for a longer period of time. Substantial evidence supports the conclusion that Livingston's actions delayed the officers long enough to prevent them from performing their duties. (See *People v. Barnes*, *supra*, 42 Cal.3d at pp. 303-304.) Therefore, we affirm the conviction for delaying a peace officer in the performance of his or her duties.

V. DISPOSITION

The judgment is affirmed.

_____
Reardon, J.

We concur:

_____
Ruvolo, P.J.

_____
Sepulveda, J.